

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

FILED: February 20, 2004

v.

CASE NO. 6:04-CR-27-ORL-18-DAB
26 U.S.C. § 7201

KENNETH E. MCDONALD, JR.

PLEA AGREEMENT

A. Particularized Terms

Pursuant to Fed. R. Crim. P. 11(c)(1)(B), the United States of America, by the Antitrust Division of the United States Department of Justice, and the defendant, KENNETH E. MCDONALD, JR., and the attorney for the defendant, Mark L. Horwitz, Esquire, mutually agree as follows:

1. Count Pleading To

Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty at arraignment to a one-count Information to be filed in the United States District Court for the Middle District of Florida. The Information charges the defendant with Income Tax Evasion in violation of 26 U.S.C. § 7201.

2. Maximum Penalties

The defendant understands that, based on his plea of guilty, he will be subject to the following maximum and mandatory minimum penalties:

- (a) Maximum term of imprisonment: five (5) years;
- (b) Mandatory minimum term of imprisonment: none;

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- (c) Term of supervised release: not more than three years;
- (d) Maximum fine: \$250,000.00;
- (e) Full restitution to all victims of the offense;
- (f) Mandatory special assessment: \$100.00.

3. Elements of the Offense

The defendant acknowledges understanding the nature and elements of the offense with which the defendant has been charged and to which the defendant is pleading guilty. The elements of the offense (Income Tax Evasion) are:

First: That the defendant owed substantial income tax in addition to that declared in his tax return; and

Second: That the defendant knowingly and willfully attempted to evade or defeat such tax.

4. No Further Charges

Upon acceptance of the guilty plea called for by this Plea Agreement and imposition of sentence by the Court, and subject to the defendant's full, truthful, and continuing cooperation as described in Sections 8 and 10 below, the Antitrust Division and the Tax Division of the United States Department of Justice and the United States Attorney's Office for the Middle District of Florida agree not to bring further criminal charges against the defendant for any act or offense known to them at the time of the execution of this agreement. The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal securities laws, or to any crime of violence.

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5. Taxes - Payment and Cooperation

The defendant agrees to pay all taxes, interest, and penalties found to be lawfully owed and due to the Internal Revenue Service for the years 1997 through and including 1999, and to cooperate with and provide to the Internal Revenue Service any documentation necessary for a correct computation of all taxes due and owing for those years, and further agrees that the Court may make this term a condition of any sentence of probation or supervised release. Defendant further agrees to, before the date of sentencing, file complete and accurate federal income tax returns for the years 1997 through 1999, inclusive.

6. Tax Loss

Pursuant to Fed. R. Crim. P. 11(c)(1)(B), the United States and the defendant agree and the United States will recommend that the tax loss attributed to the tax evasion scheme, described below, and reflected in the Information be computed as \$61,721.00, including amounts which are considered to be relevant conduct. The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court, the defendant will not be allowed to withdraw from the plea.

7. Acceptance of Responsibility

At the time of sentencing, and in the event that no adverse information is received suggesting such a recommendation to be unwarranted, the United States will recommend to the Court that the defendant receive a downward adjustment for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a) or (b). This

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recommendation is not subject to the provisions of the Patriot Act, Pub. L. 108-21, as the crime was committed before April 30, 2003 (the effective date of the amendment to this section). However, the United States will not be required to recommend acceptance of responsibility if, after entering this plea agreement, the defendant engages in conduct inconsistent with accepting responsibility. Thus, by way of example only, should the defendant falsely deny or falsely attempt to minimize his involvement in relevant offense conduct, give conflicting statements about his involvement, fail to pay the special assessment, or participate in additional criminal conduct, including unlawful personal use of a controlled substance, the United States will not be required to recommend acceptance of responsibility. The defendant further understands that the United States' recommendation or request regarding acceptance of responsibility is not binding on the Court, and if not accepted by the Court, the defendant will not be allowed to withdraw from the plea.

8. Cooperation - Substantial Assistance to Be Considered

The defendant agrees to cooperate fully with the United States in the investigation and prosecution of other persons, and to testify, subject to a prosecution for perjury or making a false statement, fully and truthfully before any federal court proceeding or federal grand jury in connection with the charges in this case, the conduct of the current federal grand jury investigation, and any other matters, such cooperation to further include a full and complete disclosure of all relevant information, including production of any and all books, papers, documents, and other objects in the defendant's possession or control, and to be reasonably available for interviews which the United States may require. If the cooperation is completed prior to sentencing, the

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United States agrees to consider whether such cooperation qualifies as “substantial assistance,” warranting the filing of a motion at the time of sentencing recommending a downward departure from the applicable guideline range pursuant to U.S.S.G. § 5K1.1. If the cooperation is completed subsequent to sentencing, the government agrees to consider whether such cooperation qualifies as “substantial assistance,” warranting the filing of a motion for a reduction of sentence pursuant to Fed. R. Crim. P. 35(b). In any case, the defendant understands that the determination as to whether “substantial assistance” has been provided or what type of motion related thereto will be filed, if any, rests with the United States, and the defendant agrees that defendant cannot and will not challenge that determination, whether by appeal, collateral attack, or otherwise.

9. Use of Information - Section 1B1.8

Pursuant to U.S.S.G. § 1B1.8(a), the United States agrees that no self-incriminating information which the defendant may provide during the course of defendant’s cooperation and pursuant to this agreement shall be used in determining the applicable sentencing guideline range, subject to the restrictions and limitations set forth in U.S.S.G. § 1B1.8(b).

10. Cooperation - Responsibilities of Parties

(a) The United States will make known to the Court and other relevant authorities the nature and extent of defendant’s cooperation. However, the defendant understands that the United States can make no representation that the Court will impose a lesser sentence solely on account of, or in consideration of, such cooperation and any other mitigating circumstances.

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(b) It is understood that should the defendant knowingly provide incomplete or untruthful testimony, statements, or information pursuant to this agreement, or should the defendant falsely implicate or incriminate any person, or should the defendant fail to voluntarily and unreservedly disclose and provide full, complete, truthful, and honest knowledge, information, and cooperation, regarding any of the matters noted herein, the following conditions shall apply:

(1) The defendant may be prosecuted for any perjury or false statement, if any, committed while testifying pursuant to this agreement, or for obstruction of justice.

(2) The United States may prosecute the defendant for any offenses set forth herein, if any, the prosecution of which in accordance with this agreement, the United States agrees to forego, and the defendant agrees to waive the statute of limitations and speedy trial claims to any such offenses.

(3) The United States may use against the defendant his own admission and statements and the information and books, papers, documents, and objects that defendant has furnished in the course of defendant's cooperation with the United States.

(4) The defendant will not be permitted to withdraw the guilty plea to the Information to which defendant hereby agrees to plead in the instant case, but, in that event, defendant will be entitled to the sentencing limitations, if any, set forth in this plea agreement, with regard to the Information to which the defendant has pled; or in the alternative, at the option of the United States, the United States may move to declare this plea agreement null and void.

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11. Violation of Plea Agreement

The defendant agrees that, should the United States determine in good faith, during the period that any federal proceeding is pending, that the defendant has failed to provide full and truthful cooperation, as described in Sections 8 and 10 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify the defendant or his counsel in writing by personal or overnight delivery or facsimile transmission and may also notify his counsel by telephone of its intention to void any of its obligations under this Plea Agreement (except its obligations under this section), and the defendant shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement.

B. Standard Terms and Conditions

12. Restitution, Special Assessment and Fine

The defendant understands and agrees that the Court, in addition to or in lieu of any other penalty, shall order the defendant to make restitution to any victim of the offense, pursuant to 18 U.S.C. § 3663A, for all offenses described in 18 U.S.C. § 3663A(c)(1) (limited to offenses committed on or after April 24, 1996); and the Court may order the defendant to make restitution to any victim of the offense, pursuant to 18 U.S.C. § 3663 (limited to offenses committed on or after November 1, 1987), including restitution as to the offense charged and all relevant conduct. On each count to which a plea of guilty is entered, the Court shall impose a special assessment, to be payable to the Clerk's Office, United States District Court, and due on date of

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sentencing. The defendant understands that this agreement imposes no limitation as to fine.

13. Supervised Release

The defendant understands that the offense to which the defendant is pleading provides for imposition of a term of supervised release upon release from imprisonment, and that, if the defendant should violate the conditions of release, the defendant would be subject to a further term of imprisonment.

14. Sentencing Information

The United States reserves its right and obligation to report to the Court and the United States Probation Office all information concerning the background, character, and conduct of the defendant, to provide relevant factual information, including the totality of the defendant's criminal activities, if any, not limited to the count to which the defendant pleads, to respond to comments made by the defendant or his counsel, and to correct any misstatements or inaccuracies. The United States further reserves its right to make any recommendations it deems appropriate regarding the disposition of this case, subject to any limitations set forth herein, if any.

Pursuant to 18 U.S.C. § 3664(d)(3) and Fed. R. Crim. P. 32(d)(2)(A)(ii), the defendant agrees to complete and submit, upon execution of this plea agreement, an affidavit reflecting the defendant's financial condition. The defendant further agrees, and by the execution of this plea agreement, authorizes the Antitrust Division to provide to, and obtain from, the United States Probation Office or any victim named in an order of restitution, or any other source, the financial affidavit, any of the defendant's federal, state, and local tax returns, bank records and any other financial information concerning

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the defendant, for the purpose of making any recommendations to the Court and for collecting any assessments, fines, restitution, or forfeiture ordered by the Court.

15. Sentencing Guidelines and Recommendations

It is understood by the parties that the Court is neither a party to nor bound by this agreement. The Court may accept or reject the agreement, or defer a decision until it has had an opportunity to consider the presentence report prepared by the United States Probation Office. The defendant understands and acknowledges that, although the parties are permitted to make recommendations and present arguments to the Court, the sentence and the sentencing guidelines, if any, applicable to the defendant's case will be determined solely by the Court, with the assistance of the United States Probation Office. The defendant understands that the Court is required to consider any applicable sentencing guidelines but may depart from these guidelines under some circumstances. The defendant acknowledges that defendant and defendant's attorney have discussed the sentencing guidelines and the defendant understands how the guidelines are applicable to the defendant's case. The defendant further understands and acknowledges that any discussions between the defendant or defendant's attorney and the attorney or other agents for the government regarding the potential application of the sentencing guidelines to defendant's case and any recommendations by the government are not binding on the United States Probation Office or the Court and that, should any recommendations be rejected, and regardless of the guidelines calculated by the Probation Office or the Court, the defendant will not be permitted to withdraw his plea pursuant to this plea agreement. The government expressly reserves the right to support and defend any decision that the Court may make with regard to the defendant's

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sentence, whether or not such decision is consistent with the government's recommendations contained herein.

16. Appeal of Sentence; Waiver

The defendant understands and acknowledges that the defendant's sentence will be determined and imposed in conformance with the Comprehensive Crime Control Act of 1984 and the federal sentencing guidelines. Defendant is also aware that a sentence imposed under the sentencing guidelines does not provide for parole. Knowing these facts, the defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum set forth for the offense and pursuant to the sentencing guidelines and expressly waives the right to appeal defendant's sentence, directly or collaterally, on any ground except for an upward departure by the sentencing judge, a sentence above the statutory maximum, a sentence in violation of the law apart from the sentencing guidelines, or the applicability of the "safety valve" provisions of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorized by 18 U.S.C. § 3742(b), the defendant is released from this waiver and may appeal the sentence as authorized by 18 U.S.C. § 3742(a). Nothing in this paragraph shall act as a bar to the defendant perfecting any legal remedies he may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct.

17. Antitrust Division, Tax Division, and Middle District of Florida

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Agreement

It is further understood that this agreement is limited to the Antitrust and Tax Divisions of the United States Department of Justice and, where noted, the Office of the United States Attorney for the Middle District of Florida and cannot bind other federal, state, or local prosecuting authorities, including the Securities and Exchange Commission, although the Antitrust Division and the Office of the United States Attorney for the Middle District of Florida will bring the defendant's cooperation, if any, to the attention of other prosecuting officers or others, if requested.

18. Filing of Agreement

This agreement shall be presented to the Court, in open court or in camera, in whole or in part, upon a showing of good cause, and filed in this cause, at the time of the defendant's entry of a plea of guilty pursuant hereto.

19. Voluntariness

The defendant acknowledges that defendant is entering into this agreement and is pleading guilty freely and voluntarily without reliance upon any discussions between the attorney for the government and the defendant and defendant's attorney and without promise of benefit of any kind (other than the concessions contained herein), and without threats, force, intimidation, or coercion of any kind. The defendant further acknowledges defendant's understanding of the nature of the offense or offenses to which defendant is pleading guilty and the elements thereof, including the penalties provided by law, and defendant's complete satisfaction with the representation and advice received from defendant's undersigned counsel (if any). The defendant also understands

that defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that defendant has the right to be tried by a jury with the assistance of counsel, the right to confront and cross-examine the witnesses against defendant, the right against compulsory self-incrimination, and the right to compulsory process for the attendance of witnesses to testify in defendant's defense; but, by pleading guilty, defendant waives or gives up those rights and there will be no trial. The defendant further understands that if defendant pleads guilty, the Court may ask defendant questions about the offense or offenses to which defendant pleaded, and if defendant answers those questions under oath, on the record, and in the presence of counsel (if any), defendant's answers may later be used against defendant in a prosecution for perjury or false statement. The defendant also understands that defendant will be adjudicated guilty of the offense to which defendant has pleaded and, if such offense is a felony, may thereby be deprived of certain rights, such as the right to vote, to hold public office, to serve on a jury, or to have possession of firearms.

20. Factual Basis

Defendant is pleading guilty because defendant is in fact guilty. The defendant certifies that defendant does hereby admit that the facts set forth below are true, and were this case to go to trial, the United States would be able to prove those facts beyond a reasonable doubt:

FACTS

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Defendant McDONALD, a resident of Volusia County from 1997 through at least 1999, willfully attempted to evade the payment of his individual income taxes for the years 1997 through 1999, inclusive.

During the years 1997 through 1999, Defendant McDONALD was employed as the Division Manager/Project Coordinator at the Kennedy Space Center Division of Olson Electric Company, Inc. ("Olson"), an electrical contractor principally engaged in the installation of electrical wiring, cable, and related materials, and a Florida corporation with its principal place of business at 225 Carswell Avenue, Holly Hill, Florida 32117. Defendant McDONALD also was a director of Olson. Olson's Kennedy Space Center Division performed work for the National Aeronautics and Space Administration ("NASA") at Kennedy Space Center ("KSC") and for general contractors on projects at KSC and Cape Canaveral Air Force Station ("CCAFS"). In his position as Division Manager/Project Coordinator, Defendant McDONALD, was responsible for the profitability and operation of his Division. Among his duties, he was responsible for approving payment on all invoices submitted to the Division by vendors and contractors.

On about May 12, 1993, Defendant McDONALD and G. H. applied for a business license with the City of Ormond Beach, Florida, for an entity known as Industrial Fabrication Services ("IFS"). In September 1994, they opened post office box number 5086, Jacksonville, Florida 32247 in the name of IFS. On or before October 1994, they opened bank account number 03100473 at SouthTrust Bank in the name of IFS.

IFS had no employees, owned no vehicles, never leased office or other space, and never sought to obtain access to KSC or CCAFS for any of its employees.

Between August 1994 through May 1999, Defendant McDONALD and G. H.

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caused Olson to issue purchase orders to IFS for goods and services allegedly needed on jobs at KSC and CCAFS. They also caused IFS to issue invoices to Olson in response to the aforementioned purchase orders and had Olson employees sign IFS delivery tickets for deliveries that were never made. From August 1994 through at least May 1999, Defendant McDONALD and G. H. submitted numerous false invoices to Olson totaling \$400,459.50. Defendant McDONALD, as Division Manager/Project Coordinator, approved the IFS invoices for payment, even though IFS never delivered or provided any goods or services to Olson.

As a result of the fraudulent invoices submitted by IFS to Olson and approved by Defendant McDONALD, Olson issued checks payable to IFS. Defendant McDONALD and G. H. then deposited the Olson checks in the IFS account and wrote checks drawn on the IFS account to themselves. Generally, these IFS checks were deposited in their personal bank accounts and used for their personal expenses and activities. Defendant McDONALD did not report any of the income that he received from IFS from 1997 through at least 1999 on the tax returns that he filed in 1997, 1998, and 1999.

Defendant McDONALD willfully evaded the payment of his individual income taxes for the years 1997, 1998, and 1999 in the amounts of \$15,360.00, \$30,058.00, and \$16,303.00, respectively. The total tax loss for the years 1997 through 1999, inclusive, is \$61,721.00.

21. Entire Agreement

This plea agreement constitutes the entire agreement between the government and the defendant with respect to the aforementioned guilty plea and no other promises, agreements, or representations exist or have been made to the

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defendant or defendant's attorney with regard to such guilty plea.

22. Certification

The defendant and defendant's counsel certify that this plea agreement has been read in its entirety by (or has been read to) the defendant and that defendant fully understands its terms.

DATED this 19 day of February, 2004.

Defendant:

United States of America:

/s/
KENNETH E. MCDONALD, JR.
Defendant

/s/
Richard E. Reed
Georgia Bar No. 597745

/s/
Mark L. Horwitz, Esquire
Attorney for the Defendant
Kenneth E. McDonald, Jr.

/s/
David A. Mobley
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